

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
Velma Korbøl, Commissioner,
Department of Human Rights,
Complainant,

v.

Clay County,
Respondent.

**ORDER ON MOTIONS TO
COMPEL DISCOVERY**

This matter is before Administrative Law Judge Beverly Jones Heydinger on cross motions by Clay County ("Respondent") and the Department of Human Rights ("Department") to compel response to discovery in this proceeding. Respondent's motion was filed on September 7, 2007. The Department's motion was filed on September 13, 2007. The Department responded to Respondent's motion on September 14, 2007 and Respondent's responded to the Department's motion on September 28, 2007.

Margaret Jacot, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, represents the Department. Dyan J. Ebert, Quinlivan & Hughes, P.A., P.O. Box 1008, St. Cloud, Minnesota 56302, represents Respondent.

Based upon the record in this matter, the Administrative Law Judge makes the following:

ORDER

1. The Department shall provide its investigative file relative to Mary Parsons to the Administrative Law Judge within fourteen days of receipt of this Order for the Administrative Law Judge's *in camera* review of the file. Following her *in camera* review of the file, the Administrative Law Judge will provide Respondent with copies of the documents she deems appropriate based on the discussion in the following Memorandum.

2. The Department shall categorize each document in the file, identifying what type of document each is (e.g., "interview transcript," "internal strategy memorandum" etc.). For each type of document designated, the Department will describe specifically why that type of document is not

discoverable. The Department may withhold documents that are direct communications addressed to or from its attorney and protected by the attorney-client privilege. This does not include documents which indicate that its attorney was one of the persons copied.

3. Respondent's motion to compel the Department to fully respond to Interrogatories 4, 5 and 7 and Requests for Production of Documents 9 and 10 within five business days of receipt of this order is DENIED. However, the Department shall fully respond to Interrogatories 4, 5 and 7 and Requests for Production of Documents 9 and 10 within five business days of the date the Department obtains the information necessary to respond to those Interrogatories.

4. The Department's motion to compel discovery responses is GRANTED. Respondent shall provide all documents responsive to request number three of the Department's First Set of Requests for Documents to the Department's counsel within fourteen days of receipt of this Order.

5. All data provided to the parties pursuant to this Order which is not public under the Minnesota Government Data Practices Act is subject to the Protective Order issued in this matter on October 3, 2007.

Dated: October 3, 2007

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

Respondent's Motions to Compel

Respondent brought its motion to compel discovery responses after the Department refused to provide its investigative file relating to Mary Parsons' complaint underlying this action, as well as responses to Interrogatories 4, 5 and 7 and Requests for Production of Documents 9 and 10, all of which concerned damages claimed by Ms. Parsons. The basis for the Department's refusal to answer Interrogatories 4, 5 and 7 and to provide the documents requested in Requests for Production 9 and 10 is that the Department does not yet have the information or documents requested. The Department states in its discovery responses that "it will produce such documents [and information] when they become available" and acknowledges in its Memorandum in Response to Respondent's Motion to compel "that discovery is an ongoing process and that [the Department] is obligated to supplement the responses provided in [its]

Answer.” Given these assertions, it is not unnecessary to order the Department to produce this information at this time. However, the Department shall provide the requested information and documents promptly as soon as it is able to do so.

Minnesota statutes section 363A.35, subd. 2 classifies human rights investigative files as confidential or protected nonpublic data, which means that they are generally not available even to the subjects of the data.¹ The statute contains several exceptions to these restrictions, including subdivision 2 (c) which permits the Commissioner of Human Rights to “make human rights investigative data contained in an open case file accessible to a person, government agency, or the public if access will aid the investigative and enforcement process” after making a finding of probable cause in a case.

Thus, the Department has the discretion to release the investigative file in this matter, but is choosing not to, based on an assertion that the file “contains information that reveals internal processes, procedures and decisions of [the Department].”² The Department then alleges:

The only documents in the investigative file which were created by [the Department] are documents which reflect the internal processes of the Department and have no bearing on what actually occurred during Ms. Parsons’ employment with Respondent. Discovery of that information could interfere with the Department’s ability to investigate future charges. Meanwhile, Respondent can obtain relevant evidence through its own investigation.³

The Department’s attempt to distinguish between documents which it created from other documents is not relevant for purposes of analyzing what is discoverable. The Department has an affirmative obligation to release certain information which seems likely to be in the investigative file. Minnesota Rules pt. 1400.6700, subp. 1 requires that parties disclose to one another “[a]ny relevant written or recorded statements made by the party or by witnesses on behalf of a party. The demanding party shall be permitted to inspect and reproduce any such statements.” Subpart 2 of the same rule permits that [a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed.” Rule 26.02 of those rules generally state:

¹ See Minn. Stat. § 13.02, subd. 3. “‘Confidential data on individuals’ means data which is made not public by statute or federal law applicable to the data and is inaccessible to the individual subject of that data.” and § 13.02, subd. 13. “‘Protected nonpublic data’ means data not on individuals which is made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data.”

² Department’s Memorandum in Opposition to Respondent’s Motion to Compel Discovery at page 3.

³ *Id.*

Parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

The broad brush with which the Department asserts its objection to Respondent's discovery request makes it impossible to determine whether, or to what extent, its investigative file is subject to discovery. The Department has not asserted any privilege recognized by law for withholding information from its file. While there may be documents which are not discoverable, such as those protected by attorney-client privilege, the ALJ cannot determine what they may be based on the Department's response. Therefore, the ALJ is requiring the Department to submit, for *in camera* review, the documents with specific information about the type of documents being submitted and how or why the documents should not be made available.

The Department's Motion to Compel

As part of its discovery request, the Department sought "all documents relating to requests for accommodation or complaints of discrimination by any persons employed by the Clay County Attorney's office during the years 2001-2005."⁴ While acknowledging that, in 2005, an employee had requested and been denied additional leave after exhausting guaranteed leave under the Family and Medical Leave Act, Respondent declined to identify the employee in question because "[i]dentification of the individual is not permitted by the Minnesota Government Data Practices Act."⁵

In its response to the Department's motion, Respondent stated "the sole basis for Respondent's refusal to respond to [the] document [r]equest . . . is the fact that, pursuant to the Minnesota Government Data Practices Act . . . the information requested is private data on individuals that can only be released pursuant to a Court Order." Because the data requested meets the conditions for discovery set forth in Minn. Stat. § 13.03, subd. 6, the ALJ is ordering its release, subject to the Protective Order which accompanies this Order. Because the data is being released subject to a Protective Order, it is not necessary to give notice to the subject of the data prior to the release of the data.

B. J. H.

⁴ Department's Motion to Compel Discovery Responses at page 2.

⁵ *Id.*, Affidavit of Margaret Jacot, para.3 and attached exhibit C.